



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 05 2014

Richard A. Spencer, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480

RE: MUR 6660
Eliot R. Cutler

Dear Mr. Spencer:

On October 12, 2012, the Federal Election Commission notified your client, Eliot R. Cutler, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. On August 26, 2014, the Commission found, on the basis of the information in the Complaint, and information provided by you, that there is no reason to believe your client violated 2 U.S.C. § 441b(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Roy Q. Lockett, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

Mark Allen
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENT:** Eliot R. Cutler

MUR: 6660

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8 **I. INTRODUCTION**

9 This matter was generated by a Complaint filed with the Federal Election Commission
10 alleging that Eliot R. Cutler violated the Federal Election Campaign Act of 1971, as amended
11 (the "Act").

12 Specifically, the Complaint alleges that Americans Elect coordinated one of
13 its independent expenditures with Angus King and his political campaign committee, Angus
14 King for U.S. Senate Campaign and its treasurer ("King Committee"), because Eliot Cutler held
15 positions with both Americans Elect — where he was a member of the board — and the
16 Committee — on which he served in the capacity of Co-Chair. Compl. at 3-5. The Complaint
17 alleges that the costs associated with that advertisement therefore constitute a prohibited in-kind
18 contribution from Americans Elect to King and the King Committee. Cutler denies that the
19 challenged advertisement of Americans Elect supporting King resulted from any coordinated
20 activity. *See* Eliot R. Cutler Resp. (Oct. 29, 2012).

21 As discussed below, the Commission has determined to find no reason to believe that
22 Eliot R. Cutler made a prohibited corporate in-kind contribution in violation of 2 U.S.C.
23 § 441b(a).

1 **II. FACTUAL BACKGROUND**

2 The Complaint alleges that Americans Elect, a non-profit social welfare organization
3 under section 501(c)(4) of the Internal Revenue Code, coordinated with King and the King
4 Committee a television advertisement supporting King's election that aired in October 2012.
5 Compl. at 2-5. This allegation was premised on the assumption that Eliot Cutler served
6 concurrent roles for both Americans Elect and the King Committee when the advertisement was
7 created, produced, and broadcast. *Id.*; see also Compl., Ex. B (text of advertisement); Compl.,
8 Ex. D (Maggie Haberman, *Americans Elect Airls \$500K in Maine Air Time in Support of King*
9 *(Updated)*, POLITICO (Oct. 5, 2012), available at [http://www.politico.com/blogs/burns-](http://www.politico.com/blogs/burns-haberman/2012/10/americans-elect-air-k-in-maine-air-time-in-support-137631.html)
10 [haberman/2012/10/americans-elect-air-k-in-maine-air-time-in-support-137631.html](http://www.politico.com/blogs/burns-haberman/2012/10/americans-elect-air-k-in-maine-air-time-in-support-137631.html)). The
11 Complaint alleges that beginning in December 2011, and continuing through the October 5,
12 2012, date of the Complaint, Cutler served as a member of Americans Elect's Board of
13 Directors. Compl. at 2. On March 8, 2012, the King Committee announced the appointment of
14 Cutler as one of the campaign's nine statewide chairs. *Id.* In view of Cutler's alleged dual roles,
15 the Complaint concludes that "[i]t is inconceivable that the pro-King Americans Elect
16 communications were made without substantial discussions, material involvement, or at the
17 request or suggestion of Cutler — an agent of the King campaign." Compl. at 5.

18 In response, Cutler represents in a sworn affidavit that he resigned from the board of
19 Americans Elect on June 26, 2012, and attaches a copy of his resignation letter. Aff. of Eliot R.
20 Cutler ¶¶ 2, 7, (Oct. 27, 2012); Cutler Resp., Ex. A. He further explains that in late April 2012,
21 he "agreed to serve as one of nine volunteer and largely honorary chairs" for the King
22 Committee, and that he also served the King Committee as a volunteer fundraiser beginning at
23 the same time. *Id.* ¶ 5. Concerning the Complaint's inference that he was a conduit for

1 communications between the King Committee and Americans Elect, Cutler represents that he
2 "had no conversations at any time" with anyone "at or in any way connected with Americans
3 Elect regarding the plans, projects, activities or needs of the King Campaign or that was material
4 to the creation, production or distribution of the TV ads"; and that he "never discussed with
5 anyone affiliated in any way with Americans Elect the content, intended audience, means or
6 mode of communication, specific media outlet used, time or frequency or size or prominence of
7 the TV ads." *Id.* ¶ 10. He also represents that he "never had any conversations or
8 communications with anyone affiliated with Americans Elect in any way suggesting or relating
9 to any assent of the [King Committee] to outside assistance, or with regard to any of the
10 activities listed in 11 C.F.R. § 109.3(b)(1) through (6) or that meets any of the content standards
11 set forth in 11 C.F.R. § 109.21(c)." *Id.*

12 Cutler states that he spoke to Kahlil Byrd, the then-CEO of Americans Elect, on May 24
13 and June 11, 2012, concerning the future of Americans Elect. Cutler Aff. ¶ 6. As a result of
14 these conversations, Cutler believed that Americans Elect officers were engaged in on-going
15 discussions about what Americans Elect would do next, including possibly to support state and
16 local candidates in 2012, 2013, and 2014 and to make adjustments for the 2016 presidential
17 election. *Id.* Cutler also noted that Byrd made some "very general references to Angus King's
18 candidacy for the U.S. Senate." *Id.* But Cutler avers that he never discussed "with Mr. Byrd or
19 anyone else affiliated in any way with Americans Elect" any political campaign activities that
20 Americans Elect or its officers or staff might undertake. *Id.*

21 According to the Americans Elect Response, "Cutler had left the leadership of Americans
22 Elect nearly one and a half months before Americans Elect first considered making an
23 independent expenditure" supporting King. Americans Elect Resp. at 4-5. Americans Elect

1 made the decision to make the independent expenditures by a vote of its Board of Directors,
2 which was scheduled for August 6, 2012. *Id.* at 3. Americans Elect also submitted an affidavit
3 of Byrd, which represents that, after resigning, Cutler “had no further management role or
4 involvement with Americans Elect.” Byrd Aff. ¶ 6; *see also id.*, Ex. A (resignation letter of Eliot
5 Cutler dated June 26, 2012), Ex. B (resolution of June 26, 2012, accepting Cutler resignation).¹
6 Further, Americans Elect demonstrates that it engaged in best practices to avoid coordination by
7 submitting sworn testimony that it informed and required directors and vendors to comply with a
8 very detailed non-coordination policy. Americans Elect Resp. at 5, Byrd Aff. ¶¶ 9-10, Ex. D
9 (copy of internal legal guidance concerning coordination), Ex. E (copy of Americans Elect
10 policy prohibiting coordination with respect to Maine senatorial election). In his affidavit, Byrd
11 represents that Americans Elect’s expenditures expressly advocating the election of King were
12 not made at the request or suggestion of the King campaign or its agents; the King campaign did
13 not assent to those expenditures; the King campaign and its agents were not involved in the
14 decision to make the expenditures; and the expenditures were not made after any substantial
15 discussion between Americans Elect, the King campaign, or their respective agents regarding the
16 plans, projects, activities, or needs of King that was material to the creation, production, or the
17 distribution of the television advertisements. *See* Byrd Aff. ¶ 13.

18 The Joint Response of King and the King Committee notes that, prior to the filing of the
19 Complaint, the press reported that Cutler had resigned from Americans Elect in June 2012 and
20 that he claimed to be unaware Americans Elect had paid for the advertisement. *See* Joint Resp.
21 at 2-4, Ex. 2 (press articles). With the Joint Response, King and the King Committee also
22 submitted an affidavit of Kathryn Rand, the King Committee’s Campaign Manager. Rand denies

¹ Byrd states that he was at all relevant times the CEO of Americans Elect. Byrd Aff. ¶ 1.

1 that she, or to her knowledge any other King campaign official, gave Cutler or any other
2 individual express or implied authority to contact Americans Elect to undertake any activities,
3 discussions, or be materially involved in any decisions regarding the creation, production, or
4 distribution of the television advertisement at issue. Aff. of Kathryn Rand ¶¶ 5-7 (Oct. 26, 2012)
5 (attached as Exhibit 3 to the Joint Response); *see also* 11 C.F.R. § 109.3(b).

6 III. LEGAL ANALYSIS

7 The Act prohibits corporations from making contributions, including in-kind
8 contributions, to federal candidates and their authorized committees. 2 U.S.C. § 441b(a).
9 Officers and directors of corporations also may not consent to any contribution prohibited by
10 section 441b(a). Correspondingly, federal candidates and their authorized committees may not
11 knowingly accept a corporate contribution. *Id.*

12 Americans Elect's costs in making the television advertisement supporting King's
13 election would constitute a prohibited corporate in-kind contribution from Americans Elect to
14 King if the advertisement was a "coordinated communication." 2 U.S.C. § 441a(a)(7)(B)(i);
15 11 C.F.R. § 109.21(b). Commission regulations provide a three-prong test to determine if a
16 communication is a coordinated communication. 11 C.F.R. § 109.21(a). First, the
17 communication must be paid for, in whole or in part, by a person other than the candidate or
18 authorized committee (the payment prong). 11 C.F.R. § 109.21(a)(1). Second, the
19 communication must satisfy one of the five content standards (the content prong). 11 C.F.R.
20 § 109.21(a)(2), (c). Third, the communication must satisfy one of the five conduct standards (the
21 conduct prong). 11 C.F.R. § 109.21(a)(3), (d). A payment for a communication satisfying all
22 three prongs of the test is made for the purpose of influencing a federal election, and therefore it
23 is an in-kind contribution.

1 As Americans Elect concedes, both the payment and content prongs of the Commission's
2 coordinated communication regulation are met here. Americans Elect Resp. at 5. Americans
3 Elect is a third-party responsible for paying to air the advertisement, and the advertisement was a
4 public communication that refers to King, a clearly identified candidate for federal office,
5 broadcast in his jurisdiction within 90 days of the November 6, 2012, general election. *See*
6 11 C.F.R. § 109.21(a)(1), (c)(4)(i).

7 The record does not provide any reason to conclude, however, that the conduct prong is
8 met in this matter. The conduct prong will be satisfied if (1) the communication was created,
9 produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the
10 candidate or his campaign was materially involved in decisions regarding the communication;
11 (3) the communication was created, produced, or distributed after substantial discussions with
12 the campaign or its agents; (4) the parties contracted with or employed a common vendor that
13 used or conveyed material information about the campaign's plans, projects, activities or needs,
14 or used material information gained from past work with the candidate to create, produce, or
15 distribute the communication; (5) the payor employed a former employee or independent
16 contractor of the candidate who used or conveyed material information about the campaign's
17 plans, projects, activities or needs, or used material information gained from past work with the
18 candidate to create, produce, or distribute the communication; or (6) the payor republished
19 campaign material. *See* 11 C.F.R. § 109.21(d).

20 The Complaint bases its coordination allegation entirely on the assumption that Cutler
21 held concurrent positions as a board member of Americans Elect and co-chair of the King
22 Committee when the advertisement was created, produced, and broadcast. Although Cutler
23 acknowledges serving as one of the King Committee's nine voluntary chairs and as a voluntary

1 fundraiser for the King Committee beginning in late April 2012 prior to his late June resignation
2 from Americans Elect, there is no information to suggest that Americans Elect was considering
3 making expenditures on behalf of King at that time, and both Cutler and Byrd represent the
4 contrary in their affidavits. Moreover, all of the relevant parties that allegedly would have
5 participated in the coordinated activities have provided factually-specific affidavits from persons
6 with relevant knowledge denying that Cutler either was involved with or was authorized to act as
7 an agent regarding any of the activities that meet the conduct prong in connection with the
8 challenged advertisement. Further, as to the period prior to Cutler's June 26, 2012, resignation,
9 he represents under penalty of perjury that he "never" discussed the relevant advertisement with
10 Americans Elect or the King Committee "at any time." Cutler Aff. ¶ 10. Moreover, both
11 Americans Elect and the King Committee also deny, with factually-specific affidavits in support,
12 that they or their agents engaged in any such activities.

13 Based on the available information, including several factually-specific affidavits, the
14 record here does not reasonably suggest that the parties engaged in any activity that would
15 satisfy the conduct prong of the Commission's coordination regulation with respect to the
16 challenged advertisement. The Commission finds no reason to believe that Eliot R. Cutler
17 violated 2 U.S.C. § 441b(a).